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FILED
JUN 8
JAMES R. BROWNING

No. 900

In the Supreme Court of the United States

OCTOBER TERM, 1958

McCORMICK & COMPANY, INCORPORATED, PETITIONER

v.

UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Claims (Pet. 18–26) is reported in 170 F. Supp. 427.

JURISDICTION

The judgment of the Court of Claims was entered on February 11, 1959. (Pet. 18.) The petition for a writ of certiorari was filed on May 8, 1959. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1255(1).

QUESTION PRESENTED

Whether 190 proof ethyl alcohol imported from France and redistilled in the United States to remove excessive impurities rendering it unfit for consump-

tion was "produced" in the United States for purposes of Section 3250(1) of the Internal Revenue Code of 1939.

STATUTE INVOLVED

Internal Revenue Code of 1939 (as amended, 26 U.S.C., 1952 ed.):

> SEC. 3250. * * * (l) * * *—(1) *In general.* Any person using distilled spirits produced in a domestic registered distillery or industrial alcohol plant and fully tax-paid in the manufacture or production of medicines, medicinal preparations, food products, flavors, or flavoring extracts which are unfit for beverage purposes, upon payment of a special tax per annum, shall be eligible for drawback at the time when such distilled spirits are used in the manufacture of such products and as hereinafter provided for.

STATEMENT

The United States Industrial Chemicals Company ("USI"), the operator of a domestic registered industrial alcohol plant, imported from France a large quantity of 190 proof ethyl alcohol. Because of the presence in the imported alcohol of impurities, particularly excessive amounts of methyl alcohol, amyl alcohol, and nonvolatile residue, it was not suitable for human consumption or for use in the manufacture of medicinal preparations, flavoring extracts, or food products. To remove the excessive impurities, USI subjected the alcohol to a chemical treatment (to make the impurities susceptible of removal by distillation) and to a complicated distillation procedure. Part of the alcohol so purified was sold to petitioner. In Au-

gust and September 1953, petitioner used 6073.20 proof gallons of the alcohol in the manufacture of flavoring extracts. (Pet. 19–21.)

A tax at the rate of $10.50 per proof gallon had been paid on the alcohol by USI (Pet. 21). Petitioner sought a drawback of the tax paid under Section 3250(l) of the Internal Revenue Code of 1939, which allows such a drawback to any person using "distilled spirits produced in a domestic registered distillery or industrial alcohol plant" in the manufacture of, *inter alia*, flavoring extracts. The Court of Claims held that the alcohol was not "produced" in the United States and hence that petitioner was not entitled to a drawback. (Pet. 23–26.)

ARGUMENT

As grounds for granting the writ, petitioner asserts that the decision below is in conflict with several decisions of this Court and with a state court decision (Pet. 4–9), is based on an error of statutory construction (Pet. 9–13) and on an unconstitutional statute (Pet. 13–15), and that the question presented is one of general importance (Pet. 15–17). These assertions are all lacking in merit.

1. The alleged conflicts with decisions of this Court are nonexistent, since the cited decisions all involved different questions and in relation to different statutory provisions. *Saltonstall* v. *Wiebusch*, 156 U.S. 601, held only that imported carpenters' pincers, scythes and grass-hooks were classifiable as "forgings of iron and steel", or "forged iron" for import duty purposes. *Tide Water Oil Co.* v. *United States*, 171 U.S. 210, held that imported boxes or cases were not

"wholly manufactured" within the United States although their manufacture was completed in this country. *Anheuser-Busch Assn.* v. *United States,* 207 U.S. 556, related to a statute entitling an exporter to a drawback of the tax paid on imported raw material "used in the manufacture of articles manufactured or produced in the United States" (p. 559) and held that corks imported from Spain and used in bottling beer were *not* manufactured in the United States merely because, after their importation, they were subjected to a cleaning and coating process to adapt them to use. In that case the Court stated (p. 562) that, to have manufacturing or production, "There must be transformation; a new and different article must emerge, 'having a distinctive name, character or use.'" *Fruit Growers Inc.* v. *Brogdex Co.,* 283 U.S. 1, was a patent infringement suit in which the Court quoted the latter language from *Anheuser-Busch Assn.* v. *United States, supra,* and held (p. 11) that the addition of borax to the rind of natural fruit "does not produce from the raw material an article for use which possesses a new or distinctive form, quality, or property." *Kidd* v. *Pearson,* 128 U.S. 1, involved constitutional questions as to the validity of a state statute prohibiting the importation of liquor into the state and sales outside the state of liquor manufactured in the state. The decision is pertinent only for its statement (p. 20) that "Manufacture is transformation—the fashioning of raw materials into a change of form for use." *United States* v. *E. C. Knight Co.,* 156 U.S. 1, was an antitrust suit in which the latter language from *Kidd* v. *Pearson, supra,* was

quoted (p. 147). *East Texas Lines* v. *Frozen Food Exp.*, 351 U.S. 49, held that frozen dressed poultry is an "agricultural" commodity, not a "manufactured" product thereof, for the purposes of the Interstate Commerce Act. Quoting from *Anheuser-Busch Assn.* v. *United States, supra*, the Court again reiterated (p. 53) that, for manufacturing, "There must be transformation; a new and different article must emerge, 'having a distinctive name, character or use.'" In that case the Court also stated (p. 54) that a commodity has not been "manufactured" where it "retains a continuing substantial identity through the processing stage."

The decision below is in full accord with the above cases insofar as they reflect a general rule for determining what constitutes "manufacturing" or "production." The inquiry here is whether the distilled spirits used by the petitioner were "produced" in the United States within the meaning of Section 3250(1) of the Internal Revenue Code of 1939, *supra*, p. 2. As the court below noted (Pet. 24), "Distilled spirits" are defined in Section 2809(b)(1) as "that substance known as ethyl alcohol * * *, which is commonly produced by the fermentation of grain, starch, molasses, or sugar * * *." The substance which USI imported from France was ethyl alcohol which had been produced by the fermentation of raw materials. Prior to the time the ethyl alcohol was received in this country, redistilled by USI to remove impurities, and sold to petitioner, there had been a "transformation" of the raw materials into a "new and different article, * * * 'having a distinctive name, character or use,'"

as well as a "fashioning of raw materials into a change of form for use," which are the tests of "manufacturing" stated in the decisions of this Court noted above. That the ethyl alcohol had to be purified by redistillation before it could be used to manufacture consumable articles did not change its character as ethyl alcohol. Petitioner is simply assuming, erroneously (cf. *Anheuser-Busch Assn.* v. *United States, supra; Fruit Growers, Inc.* v. *Brogdex Co., supra*), that a process applied to an article to adapt it to a particular use constitutes "production." Processing is *not* manufacturing or production when the processed article retains "a continuing substantial identity through the processing stage". *East Texas Lines* v. *Frozen Food Exp., supra,* 351 U.S. at 54.

2. The decision below is not in conflict with *American Distilling Co.* v. *State Board of Equalization,* 144 Cal. App. 2d 457, another case cited by petitioner. That case involved a California statute allowing the sale in the State of "distilled spirits originally distilled in this state * * *" (p. 461). It was there held that the distilled spirits involved were originally distilled in California although only the redistillation of impure alcohol imported from Illinois occurred in California. The reason for that holding, however, was that the California statute defined "distilled spirits" as meaning an "alcoholic beverage" (*id.*, p. 460). In contrast, as already noted, the federal definition of "distilled spirits" is not so limited.

3. The error of statutory construction which petitioner asserts the court below committed (Pet. 9-13) consists simply of giving recognition to the definitions

of "distilled spirits" and "alcohol" contained in the Code (see Pet. 24–25). Those definitions are contained in Chapter 26 of Subtitle B which, in Section 2800(a), imposes the tax on "distilled spirits * * * produced in or imported into the United States", whereas the Section 3250(1) provision for a drawback of the tax is in Chapter 27 of Subtitle B. But the court below was clearly correct in stating (Pet. 25) that there "is no more logical place to look for guideposts in determining the meaning of 'produced' than the definitions contained in a chapter of the Code which itself gives rise to the tax on alcohol upon which a drawback is claimed." In any event, the decision below was not based solely on the statutory definitions of "distilled spirits" and "alcohol." The court stated that it would "independently reach the same result" even if it were not convinced that the definitions were controlling (Pet. 25), because a holding that the removal of undesirable material constitutes production "would be a complete frustration of the statute's intent to limit drawbacks to domestic producers only" (Pet. 26).

4. Petitioner asserts (Pet. 13–15) that Section 3250(1) of the 1939 Code is unconstitutional because, in connection with the amendment of a similar 1954 Code provision so as to allow the drawback on imported distilled spirits, the legislative reports stated that the amendment would eliminate "existing discrimination." The assertion of unconstitutionality is plainly frivolous. This was simply a change in legislative policy. What Congress chooses to call

"discrimination" is not necessarily unconstitutional discrimination.

5. No important question is presented requiring settlement by this Court. Insofar as general principles of law are pertinent, the applicable principles have already been supplied by the decisions of this Court already noted (*supra*, pp. 3–5). The decision below is correct, we submit, and, contrary to petitioner's assumption (Pet. 16), there is no particular "confusion" to be resolved by this Court either in relation to this case or to the allegedly "innumerable" cases involving successive stages of production or manufacture in relation to other statutes.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1959.

U.S. GOVERNMENT PRINTING OFFICE: 1959